



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.52 OF 2013

EDNER GESARE OGEKA.....APPELLANT

VERSUS

AIKO KEBIBA (*Suing as father and legal representative of the Estate of*

ALICE BOCHERE AIKO – DECEASED).....RESPONDENT

(Appeal from the Judgment and Decree of Hon. Ong’ijo – Chief Magistrate dated 10th day of May 2013 in the original Kisii CMCC No.424 of 2011)

JUDGMENT

This suit was filed in the lower court by the respondent herein Aiko Kebiba (*Suing as father and legal representative of the estate of Alice Bochere Aiko – Deceased*). The deceased Alice Bochere Aiko was on 15th January 2011 a walking lawful pedestrian along Kisii-Nyamira road near Getare when the defendant's driver, agent/or servant so negligently drove, managed and/or controlled the defendant's motor vehicle Registration number KBM 826T along the said street that he caused the same to so violently knock down the deceased. The said accident resulted to the death of deceased. On 27th November 2012 the issue of liability was settled when the parties filed a consent in the following terms:

- a. **Judgment be and is hereby entered in favour of plaintiff on liability ratio of 40:60 in favour of plaintiff against defendant. Hearing on 25th February 2013 to assess quantum.**

On 25th February 2013 a further consent was recorded stating that:-

1. **Plaintiff list of documents 1 to 8 are hereby admitted as Exhibit P1 to 8 for purposes of assessing quantum.**
2. **Plaintiff and defendant's cases closed.**

In her judgment the trial court acknowledged the fact that there was no evidence adduced to support how much the deceased was earning as a monthly income thus she used a minimum wage of Ksh.5655 and a multiplier of 20 years to calculate damages for loss of dependency. For loss of expectation of life she awarded Ksh.100,000/= as well as Ksh.20,000/= for pain and suffering. The trial court also gave Ksh.80,000/= as special damages.

Thus the loss of dependency was:-

5655 x 20 x 12 x 2/3 = 904,800

For loss of expectations of life	-	Ksh.100,000.00
Pain and suffering	-	Ksh. 20,000.00
Special damages	-	Ksh. 18,000.00
Less 40% (contributory negligence)	-	<u>Ksh.417,120.00</u>
TOTAL	=	<u>Ksh.625,680.00</u>

Thus judgment was entered for the Plaintiff for Ksh.625,680/= and interest on the said amount was also awarded to the plaintiff from the date of judgment herein.

The appellant Ednar Gesare Ogega now appellant being aggrieved by the above judgment and decree preferred an appeal to this court. In his Memorandum of Appeal dated 24th May 2013 the appellant has appealed against the above judgment/decree on the following grounds:-

1. *That the learned Trial Magistrate misdirected herself in law and principle by making an award of General Damages under the fatal accident Act in the sum of Ksh.904,800/= which sum is excessive in the circumstance.*
2. *That the Learned Trial Magistrate erred in law and in fact in failing to discount and/or deduct the sum of Ksh.100,000/=, the award under the heading of loss of expectation from the total damages, thereby occasion double compensation, contrary to the principles laid down for assessment of such damages.*
3. *The Learned Trial Magistrate erred in law and principle, by adopting wrong method and principle in arriving in the quantum of damages awarded to the Respondent.*
4. *The learned Trial Magistrate erred in Principle by assessing damages over various heading instead of awarding lump-sum amount as by law required.*
5. *The Learned Trial Magistrate erred in law and principle by failing to subject the awarded costs to the contribution of 40%, liability apportioned to the Respondent.*
6. *The Learned Trial Magistrate erred in applying dependency ration of 2/3*
7. *That the Learned Trial Magistrate thereby arrived at a wrong decision by applying wrong.*

It is proposed to ask the court for orders that:-

- a. **The Appeal herein be allowed and the judgment and Decree of the Trial Magistrate dated 10th day of May 2013, be set aside in its entirety.**
- b. **That the Honourable Court be pleased to revisit the issue of assessment of the quantum of damages and assess the same a fresh.**
- c. **That the Honourable Court do hold that the costs payable is subject to contribution of 30% being the liability apportioned against each party.**
- d. **That the costs of this Appeal borne by the Respondent.**
- e. **Such further relief as the court may deem necessary.**

When the matter came before me on 14th January 2015 it was agreed amongst other directions that the appeal be canvassed by way of written submissions.

This court in this first appeal has duty and obligation to re-analyze and evaluate the evidence made by lower court before coming to its independent decision in this appeal. As indicated this case never went to formal proof as there was a consent on both liability and by consent the respondent produced a list of documents 1 to 8 as P Exhibit P 1 to 8 for purposes of assessing quantum.

On quantum there was no dispute that the deceased was aged 7 years that prior to the accident she had no terminal illnesses and she was healthy. Also, since there was no proof as to how much she earned, the trial court was correct in applying the basic minimum wage to assess the deceased monthly income.

I have considered the appellant's and respondent's submissions on the issue of quantum in **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR**, Anyara Emukule J, held:-

“.....there are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the promise of the court to determine or explore those imponderables. The duty and promise of the court is to apply the generally known period during or about which an employee of the deceased's occupation would remain in active work and retire.”

In **Beatrice Wangui Mairu vs Hon-Ezekiel Barngetuny & Another (Nairobi HCCC No.1438 of 1990 (unreported)**, and referred to in **Republic vs Leonard O. Ekisa & Another vs Major Birgen [2005] eKLR**, Ringera J, said inter alia:-

“.....there is no line of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.”

“In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the lassitude of life and factor accelerated by payment in lump sum (Hannah Wangaturi Moche & Another vs Nelson Waga (Nairobi HCCC No.4533 of 1993)”

According to the documents produced during trial, the deceased was aged 17 years, she was a mother of one daughter and her educational background was unknown. According to the trial court, submissions by counsel that she was earning Ksh.10,000/= per month were never supported thus the trial instead employed the minimum wages Legal Notice No.70 of 2009 on unskilled labour and by the time the deceased died the same was put at Ksh.5665/=. Since the deceased clearly had a child and her father as dependant the extent of dependency is a question of fact to be determined from the circumstance of each particular case. Firstly, the circumstances in this case point to the fact that the two thirds of the deceased's income went to the expenses of her family such as shelter, clothing and food for her daughter and father.

Secondly, in the absence of any vicissitudes of life which would have curtailed her working to 50 instead of the expected 60 years retirement age, in my humble view the multiplier of 20 used by the trial court was on the lower side but since the issue was never cross appealed against by the respondents it is my humble view that they were comfortable with a multiplier of 20.

Therefore, the trial court was correct in calculating the respondent's loss of dependency at the rate of the deceased's monthly salary multiplied by the number of years which would have been divided by 2/3 expense to her family i.e. $Ksh.5655 \times 12 \times 20 \times 2/3 = Ksh.904,800/=$.

Loss of Expectation of Life and Damage for Pain & Suffering:

Counsel for the appellants in grounds of appeal has antended that the trial court erred in law by not subtracting the award under the **Law Reform Act**. That is the dependants of the deceased benefitted

twice *i.e.* under **Law Reform Act** and under **Fatal Accidents Act**. In P.S. Atiyah on **Accidents Compensation** and the **Law 2nd Edition** at pg.88 it states:

“...hard reality enters this extraordinary legal stage, the law will not allow double recovery. In practice, this means the amount inherited by a person as a beneficiary of the deceased’s estate may be deducted from an award under the Fatal accidents Act on the legal justification on pretext that the inheritance is a ‘gain’ from the death which must be set off against the loss.”

Similar sentiments were also shared in **Kemfro vs A. M. Lubia and Olive Lubia [1982-1988] KAR & 27** where that court *inter alia* said:-

“....the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damage awarded under the Fatal Accident Act because the loss offered under the Latter Act must be affected by the gain from the estate under the Latter Act must be affected by the gain from the estate under the former Act.”

That court also proceeded to add:-

‘This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that:-

“...the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act....anyway the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya?

In **Benedeta Wanjiku** (*supra*) Emukule J, again observed:

“In common law jurisprudence of which Kenya is part, the courts have enroled the principles loss of expectation of life and pain and suffering by the deceased: for award of damages under the Fatal Accidents Act for pain and suffering.....determined what is commonly referred to as continual sum which has increased over the years from Ksh.10,000/= to Ksh.100,000/= currently the basis of the increased has basically been based upon the increase of life expectancy from 15 years to run 60 years currently, that life itself was until cut short by the accident ...something to the estate?”

The generally accepted principle is that very nominal damages will be awarded on these head claims of the death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before the death in this case, the antetional figure for loss of expectation of life is Ksh.100,000/=.

Similarly, since deceased died more or less immediately after the accident judging from the death certificate which states she died on 15th January 2011 same day the fatal accident causing death, occurred. The trial court’s award on pain and suffering for Ksh.20,000/= was in order.

Special Damages:

The principle is that special damages must be both pleaded and proved. That is why **Lord Goddard C.J. in Benham Carler v. Hyde Park Limited [1948] 64 JLR 177** said:-

“....plaintiffs must understand that if they bring a document for damages it is not enough to write particulars and so to speak, through them at the court saying this is what I have lost, I ask you, to give these damages, they have to be proved.”

The respondent was awarded Ksh.10,000/= as special damages which was not a subject of appeal in this matter.

The total award of damages before deduction of 40% contribution will be as follows:-

Under **Law Reform Act:-**

- | | | |
|--------------------------------|---|----------------|
| 1. Pain and suffering | - | Ksh. 20,000.00 |
| 2. Loss of expectation of life | - | Ksh.100,000.00 |

Fatal Accidents Act:-

- | | | |
|-----------------------|---|----------------|
| 3. Loss of dependency | - | Ksh.904,800.00 |
| 4. Special damages | - | Ksh. 18,000.00 |

TOTAL = Ksh.1,042,800.00

As was held in **Kemfro** (*Supra*), when the people entitled to the deceased's estate are the same persons for whose benefit the action over the **Fatal Accident Act** is brought, the award for loss of expectation to life is deductible. I will therefore subtract a sum of Ksh.100,000/= from the aforesaid Ksh.1,042,800.00. Taking into account the consent on liability that was recorded by the parties the same, aforesaid sum will be reduced by 40% as contributing negligence Ksh.377,120.00 then you subtract Ksh.912,800.00 – 377,120.00 = Ksh.565,680.00

Therefore the above appeal succeeds partially on the fact that the trial court did not deduct the amount on loss of expectation. However, the respondents still gets costs and interest of the suit on both the trial court and in this appeal.

Dated, Signed and delivered at Kisii this 12th day of June, 2015

HON. C. B. NAGILLAH

JUDGE

In the presence of:

Kusa for Appellant

Nyalundo for Respondents

Samuel Omuga Court Clerk